SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 982

O. FRANK THORNTON, SECRETARY OF STATE OF SOUTH CAROLINA, ROBERT W. TURNER, PETE B. ADAMS, BEN T. AUSTIN, III, W. EARL BEARD, SR., W. W. TAYLOR, JR., EUGENE R. OTT, AND JOHN E. MOON, APPELLANTS,

versus

CECIL D. CLAY, FELIX C. DAVIS, MINER W. CROSBY, CHARLES R. WEBB, ALBERT W. HUDSON AND R. WOODY ROGERS, APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO DISMISS

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INDEX

PAGE

Table of Authorities iii

Error in Designation of the Parties 1

The Motion to Dismiss 2

Question Involved 2

Brief in Support of Motion 3

Conclusion 7

TABLE OF AUTHORITIES

PAGE

Avery v. Midland County, Texas, 390 U. S. 474, 88 S. Ct. 1114, ... L. Ed. (2d) 4

Cipriano v. City of Houma, ... U. S. ...., 89 S. Ct. 1897 (1969), 23 L. Ed. (2d) 647 3

Kramer v. Union Free School District No. 15, ... U. S. ...., 89 S. Ct. 1886, 23 L. Ed. (2d) 583 (1969) 4

Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. (2d) 506 5

Constitutional Provisions and Statutes:

Constitution of the United States:
Fourteenth Amendment 5, 6

Constitution of South Carolina:
Article 8, Section 2 3

Code of Laws of South Carolina (1962):
Section 47-353 4

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ERROR IN DESIGNATION OF THE PARTIES

The caption employed by the Appellants herein indicates that all those listed in the category of Appellants seek to have this Court grant an Appeal from the decision of the Supreme Court of South Carolina in this case. Such is not the case. The Appellant, O. Frank Thornton, Secretary of State of South Carolina, is not dissatisfied with the result of the Supreme Court decision. He had affirm-

atively supported the position of the Appellees herein in the proceedings before the Supreme Court of South Carolina, and is filing a separate Motion to Dismiss the Appeal to this Court taken by the Appellants, Turner, Adams, Austin, Beard, Taylor, Ott and Moon.

THE MOTION TO DISMISS

The Appellees herein named, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, hereby move to dismiss the Appeal herein taken on the ground that the Appeal does not present a substantial Federal question inasmuch as:

(a) The State constitutional provision herein involved does not in any manner limit the right of franchise of any elector, and

(b) The State constitutional provision herein involved relates only to the creation of subordinate agencies of State government of South Carolina, whose creation and existence rest in the absolute discretion of the State of South Carolina and are matters of State interest only.

QUESTION INVOLVED

At issue here is whether a State constitutional provision prescribing that no city or town in South Carolina might be incorporated without the consent of the majority of the electors residing, and entitled to vote, within the district proposed to be incorporated, violates the "one man one vote" doctrine promulgated by decisions of the Supreme Court of the United States.

BRIEF IN SUPPORT OF MOTION

Section 2 of Article 8 of the Constitution of South Carolina provides:

> "No city or town shall be organized without the consent of the majority of the electors residing and entitled by law to vote within the district proposed to be incorporated; such consent to be ascertained in the manner and under such regulations as may be prescribed by law."

This provision does not prescribe that an election be held for the purpose of determining incorporation. Nor does it impose any burden on any elector within "the district proposed to be incorporated." Each elector, be he a property owner or otherwise, is an essential part of the "majority" required. Each has equal standing and equal voice. Compare *Cipriano v. City of Houma*, ... U. S. ..., 89 S. Ct. 1897 (1969), 23 L. Ed. (2d) 647. (1969.)

In construing this section, the Supreme Court of South Carolina said:

> "We find the language of Article 8, Section 2, clear, plain, and unambiguous. It requires that a majority of the qualified electors in the area to be incorporated must consent to incorporation, but leaves to the Legislature the right to prescribe how 'such consent' of the designated majority is to be ascertained. The constitutional provision does not require an election to ascertain consent, and the Legislature might have just as properly provided for consent to be ascertained through a petition."

Despite the clear import of the State constitutional language, the General Assembly of South Carolina had enacted a statute providing a method for incorporating "districts" containing a population in excess of 5,000. It provided that following the filing of a petition signed by at least 100 "freehold voters" of the proposed city, an elec-

tion should be held, *inter alia*, upon the question of incorporation. The South Carolina statute imposes no standards by which density of population or geographic boundaries shall be determined and it leaves to those filing the petition the privilege of setting up the boundaries of the proposed city. The statute then provided that if a majority of those voting in such election shall vote in favor of the proposed territory being incorporated, the Secretary of State should issue a certificate of incorporation. This last mentioned provision of the statute was held by the Court to be violative of the quoted section of the State Constitution, and the Supreme Court of South Carolina held:

> "To the extent that Section 47-353 permits incorporation upon the actual consent of less than a 'majority of the electors residing and entitled by law to vote within the district proposed to be incorporated,' it is hereby declared to be unconstitutional".

This is not a case where a State constitutional provision makes certain governmental action dependent upon an election and grants the right to vote to certain *bona fide* residents of requisite age and citizenship and denies the franchise to others. *Kramer v. Union Free School District No. 15* . . . U. S. . . . , 89 S. Ct. 1886, 23 L. Ed. (2d) 583 (1969). Nor is it a case where a State has delegated law making power to local government and dilutes the effective voice of the election process. *Avery v. Midland County, Texas*, 390 U. S. 474, 88 S. Ct. 1114, . . L. Ed. (2d) . . . On the contrary, it is a provision of peculiar State interest relating only to the functioning of State government and is imposed by the State constitution in response to the guarantee to the States of the Union of a republican form of government. Nowhere in this provision is the elective process delegated. Nowhere are some electors treated differently from others.

Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. (2d) 506, relied upon by the Appellants, makes clear that the 14th Amendment does not apply to political units of the States. It says:

> "Political subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh*, 207 U. S. 161, 178, 28 S. Ct. 40, 46, 52 L. Ed. 151, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] * * * and the territory over which they shall be exercised rests in the absolute discretion of the state.'"

It would accordingly seem that the framers of the South Carolina Constitution might or might not have provided for incorporated municipalities.

There are well founded reasons which establish the wisdom of this State constitutional provision. Here involved is an area of 34 square miles with a population in excess of 94,000 people. Here involved is an election called on the petition of only slightly more than 100 "freehold voters." Here involved is an area larger than any incorporated municipality in South Carolina. In comparison, the City of Charleston has an area of 15.6 square miles; the City of Columbia has an area of 22 square miles; and the City of Greenville has an area of 22.4 square miles. The cities named are the State's largest cities.

Situate within the area are only 16,900 qualified electors out of the total population of 94,000. Yet, of this number of qualified electors, only 7,315 persons, or 43% of the

registered electors, voted in the election. While a majority of those voting (4,572) did vote favorably, the percentage with respect to population is less than 5%, and the percentage with respect to total qualified electors is only 27%. The incorporation of any area involves the delegation of specific governmental functions from the State itself to the local unit upon its incorporation. It is a matter of State interest to insist that before local government may be enjoyed, it must be demonstrated that there is a substantial demand therefor in the community to be incorporated. This is a matter of compelling State interest, which can be determined only at the State level. It is not a matter of Federal concern.

Surely, the 14th Amendment did not intend to preclude a state from prescribing reasonable conditions precedent for the establishment of local government. The incorporation of any area inevitably brings with it burdens as well as benefits. Not infrequently do the burdens exceed the benefits, but in all events incorporation imposes the responsibility of local government upon the particular community. Hence, it is not unreasonable to require a showing that a majority of the registered electors of the community are willing to assume the responsibility of local government.

The State constitutional provision here challenged is fair and reasonable. It was ordained in the exercise of the republican form of government guaranteed to the states of the Union. It operates entirely within an area of interest to the State alone and is, therefore, insulated from Federal judicial review.

CONCLUSION

For the reasons herein stated, the Appellees submit that the motion herein made should be granted and the Appeal dismissed.

Respectfully submitted,

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January 12, 1970.